

## PRACTICE ADVISORY<sup>1</sup>

Updated February 2015

### THE CHILD STATUS PROTECTION ACT

By Mary Kenney

The Child Status Protection Act (CSPA)<sup>2</sup> was enacted to provide relief to children who “age-out”—that is, turn 21 and lose their preferential immigration status as a “child”—as a result of either visa backlogs or delays by the U.S. Citizenship and Immigration Services (USCIS) in processing visa petitions and asylum and refugee applications. The Immigration and Nationality Act (INA) defines a “child” as an unmarried individual under 21 years of age.<sup>3</sup> The CSPA does not change this definition, but instead changes the point at which the child’s age is calculated.

Prior to the CSPA, a child who turned 21 before the relevant application for immigration benefits was decided would age-out. As the result of agency delays and visa backlogs, many children aged out before their cases were complete. For cases to which it pertains, the CSPA now freezes the age of the child at an earlier date in the process, and the frozen age—rather than the child’s biological age—is used to determine eligibility for certain immigration benefits. In this way the CSPA preserves the status of “child” for many individuals who otherwise would age out.

The CSPA’s method of calculating a person’s age varies depending on the type of immigration benefit that is sought. The CSPA applies to:

- Derivative beneficiaries of asylum and refugee applications;
- Children of U.S. citizens;
- Children of lawful permanent residents (LPRs); and
- Children named as derivative beneficiaries of family and employment-based visa petitions, and diversity visa applications.

---

<sup>1</sup> Copyright (c) 2015 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

<sup>2</sup> Pub. L. No. 107-208 (Aug. 6, 2002).

<sup>3</sup> INA §101(b)(1). To be considered a “child,” the individual also must be unmarried at the relevant time. *Id.*; see also INA §101(a)(39). The CSPA did not change this requirement.

According to USCIS, the CSPA does not apply to applicants for or derivatives of the Nicaraguan Adjustment and Central American Relief Act;<sup>4</sup> Haitian Refugee Immigration Fairness Act; Family Unity; Special Immigrant Juvenile Status; Cuban Adjustment Act; or nonimmigrant visas.<sup>5</sup> While the Board of Immigration Appeals (BIA) has held that, generally, the CSPA does not apply to K visas because these are non-immigrant visas,<sup>6</sup> USCIS has outlined limited circumstances where it finds that the CSPA will cover K-4 beneficiaries.<sup>7</sup> The BIA also has held that the CSPA does not apply to prevent a qualifying relative from aging-out for purposes of cancellation of removal.<sup>8</sup>

This practice advisory provides an overview of the CSPA, its effective date, and the interpretation and implementation of it by USCIS, U.S. Department of State (DOS), the BIA and the courts. It includes a discussion of the Supreme Court's 2014 decision, *Scialabba v. Cuellar*, 134 S.Ct. 2191 (2014). The CSPA is complex. Although, it has been law for more than ten years, there are no regulations implementing it. Instead, both USCIS and DOS are relying on interpretative memoranda and cables; BIA decisions, both precedential and nonprecedential; and court decisions.<sup>9</sup>

## 1. DERIVATIVE BENEFICIARIES OF ASYLEES AND REFUGEES

The child of an individual granted asylee or refugee status may be granted the same status if accompanying or following-to-join the parent.<sup>10</sup> The CSPA amends the asylum and refugee provisions by freezing the age of a child on the date that the parent files the asylum or refugee application, regardless of how old the child is when the asylum or refugee application is finally approved.<sup>11</sup> Thus, a child who is 20 when the parent files for asylum will retain the status of a

---

<sup>4</sup> See also *Tista v. Holder*, 722 F.3d 1122 (9th Cir. 2013) (analyzing CSPA provisions and finding that they do not apply to NACARA applications).

<sup>5</sup> See "Revised Guidance for the CSPA" (Mar. 30, 2008), published on AILA.org at Doc. No. 08050669; see also *Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009) (CSPA does not apply to HRIFA cases). For more on nonimmigrant V visas and "aging-out," see "Adjudication of Form I-539 for V-2 and V-3 extension" (Jan. 10, 2005), published on AILA.org at Doc. No. 05020460.

<sup>6</sup> See *Matter of Akram*, 25 I&N Dec. 874, 877 n.5 (BIA 2012).

<sup>7</sup> See "Revised Guidance for the CSPA," *supra*. For reasons unrelated to the CSPA, aging-out should no longer be a problem for a K-2 visa holder (child of a fiancé(e) of a U.S. citizen). In *Matter of Le*, 25 I&N Dec. 541 (BIA 2011), the BIA, interpreting the INA provisions relating to K-visas, held that INA § 245(a)'s requirements that an applicant be eligible for a visa and that a visa be immediately available are to be established on the date that a K-2 visa holder is admitted to the U.S. Consequently, if a K-2 visa holder is under 21 on the date of admission, he or she may adjust as the "child" of the fiancé(e) even if over 21 at the time of adjustment.

<sup>8</sup> See *Matter of Isidro-Zamorano*, 25 I&N Dec. 829 (BIA 2012) (where cancellation applicant's son or daughter was under 21 at the time application was filed but turned 21 before it was decided, applicant no longer had a qualifying relative).

<sup>9</sup> Many of these and other resources are collected on the [CSPA](#) page on AILA.org. For additional resources, see the Councils web page on the [CSPA](#) and C. Wheeler, [AILA's Focus on the Child Status Protection Act](#) (2008).

<sup>10</sup> INA §§207(c)(2) and 208(b)(3).

<sup>11</sup> CSPA §§4 and 5, codified at INA §§207(c)(2)(B) and 208(b)(3)(B).

child even if the child is 22 when the asylum application is approved. The BIA confirmed this reading of the statute in *Matter of A-Y-M*.<sup>12</sup>

USCIS has issued several memoranda explaining how the CSPA will be applied to the children of asylees and refugees.<sup>13</sup> USCIS is interpreting the CSPA as allowing a derivative applicant who is eligible for CSPA coverage to retain the status of “child” for all eligibility determinations related to the asylum or refugee status, including the application for asylum (Form I-589); adjustment as an asylee or a refugee under INA §209 (Form I-485); admission to the United States as a refugee (Form I-590); and an application to accompany or follow to join a parent (Form I-730).<sup>14</sup>

There are two ways for a child to obtain derivative asylee or refugee status. First, the child can be included in the parent’s asylum or refugee application. In these circumstances, the CSPA will apply if (1) the child was under 21 when the asylum or refugee application was filed; and (2) the parent adds the child’s name to the application before it is adjudicated.<sup>15</sup> For example, the CSPA will apply if an asylum applicant adds a 22-year-old child who is present in the United States to a pending asylum application, provided the child was under 21 when the asylum application was filed. Thus, for any asylum or refugee application filed on or after August 6, 2002 (the date the CSPA was adopted), a derivative child named in the application will retain classification as a child for purposes of the initial asylum or refugee determination, for any subsequent Form I-730 Refugee/Asylee Relative Petition, and/or for the section 209 adjustment.<sup>16</sup> Note that for refugee cases, USCIS interprets the date that a refugee application is “filed” as being the date that the refugee is interviewed by a Department of Homeland Security (DHS) officer.<sup>17</sup>

Second, a child not included in the asylum or refugee application (or in asylum cases, a child who is not present in the United States), may obtain derivative asylee or refugee status if the parent files a Form I-730, Refugee/Asylee Relative Petition, within two years of being granted asylum or admitted to the United States as a refugee.<sup>18</sup> The CSPA also applies to children who obtain derivative asylum benefits through an I-730.

---

<sup>12</sup> 25 I&N Dec. 791 (BIA 2011).

<sup>13</sup> See “HR 1209—Child Status Protection Act” (August 7, 2002), *published on AILA.org* at Doc. No. 02090531; “[Processing Derivative Refugees and Asylees under the Child Status Protection Act](#),” July 23, 2003; and “The Child Status Protection Act—Children of Asylees and Refugees” (August 17, 2004), *published on AILA.org* at Doc. No. 04091561. The Executive Office for Immigration Review (EOIR) also has issued a memorandum discussing the application of the CSPA in certain asylum cases. See “Conditional Grants of Asylum Based on Coercive Population Control Policies” (Sept. 30, 2003), *published on AILA.org* at Doc. No. 03100642.

<sup>14</sup> See “The Child Status Protection Act—Children of Asylees and Refugees,” *supra*.

<sup>15</sup> See “HR 1209—Child Status Protection Act,” *supra*.

<sup>16</sup> See “The Child Status Protection Act—Children of Asylees and Refugees,” *supra*.

<sup>17</sup> See “Processing Derivative Refugees and Asylees under the Child Status Protection Act,” *supra*.

<sup>18</sup> For more on Form I-730, see USCIS’s PowerPoint entitled “Refugee/Asylee Relative Petition (Form I-170),” *published on AILA.org* at Doc. No. 13072347.

USCIS has interpreted the effective date provision of the CSPA (CSPA §8) as allowing CSPA coverage in asylum and refugee cases in any of the following situations:

- The parent’s application for refugee/asylum status was pending on or filed after August 6, 2002, and the derivative was under the age of 21 at the time of filing;
- The Form I-730 from which the derivative is benefiting was pending on August 6, 2002, and the derivative was under the age of 21 at the time the I-730 was filed;
- The parent’s application for refugee/asylum status or the I-730 was filed prior to August 6, 2002, and the derivative turned 21 years of age on or after that date.<sup>19</sup>

Note that forms I-590 (for classification as a refugee) and I-730 (Refugee/Asylum Relative Petition) are considered to have been pending on August 6, 2002 even if they were approved, as long as the beneficiaries had not been issued travel documentation as of that date.<sup>20</sup>

Finally, with respect to asylum adjustment cases under INA §209, USCIS indicates in a footnote in one memorandum that when the adjustment application is being adjudicated, the applicant is already an asylee based on classification as a child.<sup>21</sup> Thus, USCIS concludes that the applicant remains eligible to retain the classification of child—apparently even where the child aged out prior to August 6, 2002—for an I-485 application filed on or *after* this date (emphasis in the original).<sup>22</sup>

## **2. IMMEDIATE RELATIVE—CHILD OF A U.S. CITIZEN**

As a general rule, the CSPA freezes the age of a child of a U.S. citizen (USC) on the date that the USC parent files an I-130 visa petition for the child (or the date on which an immediate relative files a self-petition under VAWA).<sup>23</sup> Thus, if a USC father files an I-130 for his unmarried daughter when the daughter is 20, the daughter will retain the status of a “child” even if the visa petition or adjustment of status application is not adjudicated until the daughter is 22 years old.

The CSPA includes two statutory modifications to this general rule, both of which involve conversions of a petition from a preference category to the immediate relative category. First, when an LPR parent petitions for a child under the Family 2A preference category, and the LPR naturalizes while the petition is pending, the age of the child will freeze on the date of the parent’s naturalization. Note that it is the biological age, not the CSPA adjusted age (see section 3, below), that is used for this determination. Thus, if the biological age of the child is under 21

---

<sup>19</sup> See “Processing Derivative Refugees and Asylees under the Child Status Protection Act,” *supra*.

<sup>20</sup> *Id.*

<sup>21</sup> See “The Child Status Protection Act—Children of Asylees and Refugees,” *supra*.

<sup>22</sup> There are no examples in the memo to illustrate this situation; in the only adjustment example in which the child ages out *prior* to the effective date of the statute, the I-485 is already filed and still pending on the effective date.

<sup>23</sup> CSPA §2, codified at INA §201(f)(1); INA §201(f)(4); *see also* “Revised Guidance for the CSPA,” *supra*.

on the parent's naturalization date, the petition will be converted to an immediate relative petition.<sup>24</sup>

**Practice Pointer:** Be aware, however, that if the child's biological age is over 21 on the date the parent naturalizes, the child will *not* be eligible for CSPA benefits; that is, he or she will be ineligible to benefit from the CSPA formula for adjusting a child's age, discussed in section 3 below. Instead, the child will be considered an adult child of a U.S. citizen and the visa petition will be converted to the family 1st preference category. The child can choose to "opt out" of this conversion and remain in the family 2B category, but will not have the option of converting to the family 2A category even if, under the CSPA age-adjustment formula, that is the category he or she would have been in had the parent not naturalized. See section 5, below, for a discussion of the opt-out procedure. It is very important to counsel clients about the timing of naturalization and the potential adverse consequences that a parent's naturalization could have on a beneficiary child.

Second, when a USC parent files a visa petition for a married son or daughter under the third preference, and the son or daughter legally terminates the marriage while the petition is pending, the son or daughter's age will freeze on the date that the marriage is legally terminated. If this age is under 21, the petition will be converted to an immediate relative petition.<sup>25</sup>

Additionally, although not in the statute, DOS has stated that it will allow certain beneficiaries who initially fell within the immediate relative category but who aged out and were converted to the family 1st preference category and who, under the CSPA, are again eligible for immediate relative status, to opt out of a conversion back to immediate relative.<sup>26</sup> DOS explains that beneficiaries with children may want to remain in the 1st preference category in order to have their children included as derivatives—an option that is not open to immediate relatives. This opt-out from CSPA coverage will be allowed if the beneficiary requests this and if the priority date falls within the first preference cut-off date. It is not clear from the DOS cable, however, whether this option is limited to those whose cases initially began in the immediate relative category.

### **3. CHILD OF LPR OR DERIVATIVE CHILD OF FAMILY-BASED, EMPLOYMENT-BASED, OR DIVERSITY VISA**

The process for determining the age of the child beneficiary—either direct or derivative—of a family-sponsored or employment-based visa petition or of a diversity visa application under the CSPA is more complicated. The statutory formula for these cases is that the child's age will freeze as of the date that a visa number becomes available for the petition in question reduced by the number of days that the petition was pending, but only if the child seeks to acquire the status

---

<sup>24</sup> CSPA §2, codified at INA §201(f)(2); *see also* "Revised Guidance for the CSPA," *supra*.

<sup>25</sup> CSPA §2, codified at INA §201(f)(3).

<sup>26</sup> *See* "DOS Issues Revised Cable on Child Status Protection Act" (Jan. 2003), *published on* AILA.org at Doc. No. 03020550.

of an LPR within one year of the date the visa became available.<sup>27</sup> This CSPA benefit also applies to self-petitioners and to derivatives of self-petitioners.<sup>28</sup>

This formula can be broken down into three steps:

- First, determine the child’s age at the time a visa number becomes available;
- Second, subtract from this age the number of days that the visa petition was pending; and
- Third, determine whether the beneficiary sought LPR status within one year of the visa availability date (or if the one year is not yet over, ensure that the child beneficiary takes the necessary steps).

The first two steps will determine the child’s age. This age will only be frozen, however, if the third step is met. Each of these steps is discussed briefly below. Both the legacy-Immigration and Naturalization Service (INS) and USCIS memoranda and DOS cables cited in this practice advisory contain examples illustrating how this formula is to be applied in a variety of case situations. DOS also provides a worksheet to calculate age.<sup>29</sup>

**Practice Pointer:** When calculating the child’s age, remember that the USA PATRIOT Act provides extended “child” status to someone who turned 21 during or after September 2001, provided he or she is a beneficiary of a petition or application that was filed on or before September 11, 2001.<sup>30</sup> Beneficiaries of petitions filed on or before this date who turned 21 during September 2001 are entitled to a 90-day extension of their child status. This means that these beneficiaries can subtract 90 days from their biological age before calculating their CSPA age. Beneficiaries of petitions filed on or before this date who turn 21 after September 2001 are entitled to a 45-day extension of their child status, which means they can subtract 45 days from their biological age.

**a. How do I determine when a visa number has become available?**

The first step is to determine the child’s age at the time that a visa number became available for the petition in question. Both USCIS and DOS state that a visa number becomes available on the first day of the month that the DOS *Visa Bulletin* says that the priority date has been reached.

If the visa number is already available when the petition is approved, however, the agencies interpret the “visa availability” date for the CSPA as the date that the petition is approved.<sup>31</sup>

If a visa availability date retrogresses after the individual has filed an application for adjustment of status (Form I-485) based on an *approved* visa petition, USCIS states that it will retain the I-485 and note on it the visa availability date at the time that the I-485 was filed. When a visa number again becomes available, USCIS is to calculate the beneficiary’s age under the CSPA formula by using the earlier visa availability date marked on the I-485.<sup>32</sup> USCIS says that it will

---

<sup>27</sup> CSPA §3, codified at INA §203(h).

<sup>28</sup> INA §203(h)(4).

<sup>29</sup> See “DOS Issues Revised Cable on Child Status Protection Act,” *supra*.

<sup>30</sup> USA PATRIOT Act, Pub.L. No. 107-56, 115 Stat. 272 (2001).

<sup>31</sup> See “Revised Guidance for the CSPA,” *supra*; “DOS Cable on Child Status Protection Act” (Aug. 6, 2002), *published on AILA.org* at Doc. No. 02090940.

<sup>32</sup> See “Revised Guidance for the CSPA,” *supra*.

not follow this practice if the I-485 was not filed at the time that the visa availability date retrogressed. Instead, if the I-485 is filed after the visa availability date retrogresses but before one year of when the visa availability date again becomes current, the beneficiary's age is calculated using the second visa availability date.<sup>33</sup> DOS has expressed a similar policy.<sup>34</sup>

**b. How do I determine how long a visa petition has been pending?**

A child's age will be determined by subtracting the number of days that the visa petition was pending from the child's age at the time a visa number became available. Generally, a petition is pending between the date that the petition is properly filed (receipt date) and the date that an approval is issued. In family-sponsored cases, the receipt date is also the priority date. For employment-based cases, however, the date to be used in CSPA calculations is the date the I-140 visa petition is filed (the receipt date) and not the priority date.<sup>35</sup>

Both USCIS and DOS state that for a derivative of a diversity visa, a petition is considered pending between the first day of the diversity visa mail-in application period for the program year in which the principal has qualified and the date on the letter notifying the principal applicant that the application was selected.<sup>36</sup>

**c. How do I determine whether the beneficiary "sought to acquire" LPR status within one year of visa availability?**

The child's age—determined by the first two steps described above—will freeze only if the beneficiary has "sought to acquire" the status of an LPR within one year of the visa availability.

In *Matter of O. Vasquez*, the BIA outlined how the phrase "sought to acquire" would be interpreted.<sup>37</sup> The BIA held that a noncitizen could satisfy the "sought to acquire" provision by either filing an adjustment application<sup>38</sup> or showing that there were extraordinary circumstances preventing the applicant from filing within the one year period, particularly where the timely failure to file was beyond the applicant's control. The BIA used as an example a case in which an applicant pays an attorney to assist with the application, prepares and signs the application prior to the deadline, but then the attorney fails to file the application on time.<sup>39</sup> The Board then went on to state that "actions that do not approximate the filing of an application or extraordinary circumstances, such as contacting an attorney about initiating the process for obtaining a visa that has become available, are insufficient" to satisfy the "sought to acquire provision."<sup>40</sup> The

---

<sup>33</sup> *Id.*

<sup>34</sup> See AILA and DOS Liaison Meeting minutes (April 3, 2008), published on AILA.org at Doc. No. No. 08080840.

<sup>35</sup> *Id.* This difference between family and employment-based cases is because, for many employment-based cases, the priority date is the date that the labor certification application is filed rather than the date that the I-140 visa petition is filed.

<sup>36</sup> *Id.*; see also "DOS Cable on Child Status Protection Act," *supra*.

<sup>37</sup> 25 I&N Dec. 817 (BIA 2012).

<sup>38</sup> *Matter of O. Vasquez* was an adjustment of status case; presumably its holding extends to the appropriate forms for consular processing.

<sup>39</sup> *Id.*, 25 I&N Dec. at 821-22.

<sup>40</sup> *Id.*, 25 I&N Dec. at 822.



Seventh Circuit subsequently upheld *Matter of O. Vasquez* as a permissible interpretation of the CSPA.<sup>41</sup> However, the court remanded the case after finding that, under the facts presented, the retroactive application of *Matter of O. Vasquez* to the petitioner would work a manifest injustice.<sup>42</sup>

*Matter of O. Vasquez* is binding on all USCIS adjudicators,<sup>43</sup> and also should be followed by DOS. Prior to *Matter of O. Vasquez*, guidance from both USCIS and DOS interpreted the phrase more narrowly. For a child beneficiary who was adjusting status, USCIS equated the phrase “sought to acquire” only with the filing of an I-485 application for adjustment.<sup>44</sup> Similarly, in cases in which the child was subject to consular processing, DOS guidance stated that a child beneficiary will satisfy the “sought to acquire” requirement when Form DS 230, Part I is submitted by the child, or by the child’s parent on the child’s behalf. DOS stressed that in derivative cases, it must be Part I of an application filed specifically on behalf of the derivative child; it was not enough for the principal to seek LPR status within the one-year time frame.<sup>45</sup> In cases in which no record of Part I of the visa packet for a derivative child exists at the consular post, DOS placed the burden on the derivative to demonstrate sufficient alternate proof.<sup>46</sup>

Pursuant to *Matter of O. Vasquez*, both USCIS and DOS now should recognize “extraordinary circumstances” that prevent a person from filing the requisite application within the one year period. USCIS has issued interim guidance on how its adjudicators should evaluate claims of “exceptional circumstances.”<sup>47</sup> This guidance draws from regulations and BIA decisions that concern the same term—extraordinary circumstances—as it is used in the context of the one year filing deadline for asylum applications. USCIS will require an applicant to show three things in order to demonstrate “extraordinary circumstances:” (1) The circumstances were not created by the applicant through his own action or inaction; (2) The circumstances were directly related to his failure to file the application within the one year period; and (3) The delay was reasonable under the circumstances. USCIS provides a non-exhaustive list of examples of extraordinary circumstances that may warrant an exception to the one year “sought to acquire” requirement.<sup>48</sup> In response to a request for comments on this interim guidance, the American Immigration Council and AILA submitted joint comments.<sup>49</sup>

---

<sup>41</sup> *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014).

<sup>42</sup> *Id.*, 760 F.3d at 578-84.

<sup>43</sup> See INA § 103(a)(1) (rulings of the Attorney General with respect to questions of law are controlling for all DHS employees); 8 C.F.R. § 1003.1(g) (BIA precedent decisions are binding on all employees of DHS).

<sup>44</sup> See “Revised Guidance for the CSPA,” *supra*.

<sup>45</sup> See “DOS Issues Revised Cable on Child Status Protection Act,” *supra*.

<sup>46</sup> *Id.*

<sup>47</sup> See “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within One Year of Visa Availability Pursuant to the Child Status Protection Act” (June 6, 2014 ), *published on* AILA.org at Doc. No. 14063040.

<sup>48</sup> *Id.*

<sup>49</sup> See [AILA/Immigration Council Comments on CSPA Extraordinary Circumstances Guidance](#) (Jul 23, 2014), *published on* AILA.org at No. 14072399.



#### 4. AUTOMATIC CONVERSION AND RETENTION OF PRIORITY DATE FOR AGED-OUT BENEFICIARIES

The CSPA does not protect all beneficiaries from “aging out.” Some individuals will be found to be over 21 when the CSPA formula for determining the age of the beneficiary is applied. For some of these aged-out individuals, the CSPA provides alternate benefits—specifically, retention of the earlier priority date and conversion of the visa petition.

The CSPA created a new statutory provision which states that if the age of a beneficiary is determined to be 21 years or older for purposes of INA §§203(a)(2)(A) (visa classification for children of LPRs) or 203(d) (derivative beneficiaries of family, employment and diversity visa petitions), “the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”<sup>50</sup>

In *Matter of Wang*,<sup>51</sup> the BIA narrowly interpreted this provision by holding that the priority date retention and automatic conversion benefits do not apply to a derivative beneficiary of a 4th preference family-based visa petition. Instead, the BIA found that this section only would apply to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary. Thus, the BIA found that Wang’s aged-out daughter—who had been named as a derivative beneficiary on the 4th preference visa petition filed for Wang by his brother—could not retain the priority date of this 4th preference visa petition.

*Matter of Wang* was challenged in several federal court cases, including a case that eventually reached the Supreme Court. In *Scialabba v. Cuellar de Osorio*, a plurality of the Court upheld the BIA’s interpretation of INA § 203(h)(3).<sup>52</sup> Five Supreme Court Justices agreed that §203(h)(3) was ambiguous—although there was some disagreement amongst them as to the nature of this ambiguity—and that *Matter of Wang* was a reasonable interpretation of this ambiguous provision.<sup>53</sup>

As a consequence, the alternative benefit for aged-out beneficiaries found in §203(h)(3) applies only to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary; that is, it only will apply to those in the family 2A preference category. Aged-out derivative beneficiaries in the other family-based categories, as well as derivative beneficiaries of employment-based petitions and of diversity visa applications will not benefit from this provision.

#### 5. CONVERSION FROM 2d PREFERENCE TO 1st PREFERENCE; OPT-OUT PROVISION

The CSPA also addresses what happens to a visa petition for an unmarried son or daughter of an LPR when the parent naturalizes. It provides that a family-based visa petition filed by an LPR on behalf of an unmarried son or daughter (who is over 21) will automatically convert to a family

---

<sup>50</sup> CSPA §3, codified at INA §203(h)(3).

<sup>51</sup> *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

<sup>52</sup> 134 S.Ct. 2191 (2014).

<sup>53</sup> *Id.* *Cuellar* is a plurality decision because five justices agreed on the result—that *Matter of Wang* should be upheld—but disagreed on the reasoning. All together there were four decisions issued in *Cuellar*: the plurality decision; a concurrence; and two dissents.

1st preference petition if the LPR naturalizes while the petition is still pending.<sup>54</sup> If the beneficiary was assigned a priority date prior to the conversion of the petition, he or she will maintain that priority date after the conversion.<sup>55</sup>

This provision also allows the beneficiary to elect not to have the petition converted, or if already converted, to have the conversion revoked. When the beneficiary makes this election, the case will continue as if the parent had not naturalized.<sup>56</sup> This provision assists beneficiaries of petitions from countries in which the F1 visa category is more backlogged than the F2B category. For many years, this was the case only with respect to the backlog in the Philippines. However, since June 2014, visas for the Philippines in the F1 category have done better than those in the F3 category. In contrast, in June 2014, F1 visas for all other countries except Mexico became more backlogged than those in the F2B category. Similarly, in October 2014, the F1 backlog for Mexico became greater than the F2B backlog. As a consequence, following a parent's naturalization, beneficiaries from these countries may wish to opt out of the automatic conversion. In any such case, it is essential to review the visa bulletin to determine whether the automatic conversion of the petition from the F2B category to the F1 category is best for the beneficiary.<sup>57</sup>

USCIS will allow a beneficiary to "opt out" regardless of whether the original petition was initially filed in the 2B preference category or was first filed in the 2A preference category and later converted to the 2B category because the child aged out.<sup>58</sup> USCIS reads the statutory language "initially filed" to mean that the petition was *initially filed* for a beneficiary who is *now* in the 2B unmarried son or daughter classification, regardless of whether the petition was originally filed in the 2A category. Individuals who wish to opt out may do so by filing a request in writing with the USCIS District Office that has jurisdiction over the beneficiary's residence.<sup>59</sup>

USCIS also takes the position that it is the beneficiary's biological age at the time of naturalization that is "locked in" or "fixed," and not the beneficiary's CSPA adjusted age.<sup>60</sup> The BIA agrees. In a precedent decision, the BIA held that, pursuant to INA §204(k)(1), the fact that the beneficiary was over 21 at the time that his mother naturalized meant that the 2A family-based petition that she had filed on his behalf automatically converted to the 1st family

---

<sup>54</sup> CSPA §6, codified at INA §204(k)(1).

<sup>55</sup> CSPA §6, codified at INA §204(k)(3).

<sup>56</sup> CSPA §6, codified at INA §204(k)(2); *see* "Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status" (June 14, 2006), *published on* AILA.org at Doc. No. 06062870.

<sup>57</sup> *See* DOS Visa Bulletin to determine the visa availability of visa numbers in a given month. For a full explanation of changes in the backlogs of these visa categories for various countries, *see* the blog of Cyrus Mehta, <http://blog.cyrusmehta.com/2015/03/every-country-except-philippines-new.html>.

<sup>58</sup> *See* "Clarification of Aging Out Provisions as They Affect Preference Relatives," *supra*.

<sup>59</sup> *See* "Revised Guidance for the CSPA," *supra* at 6.

<sup>60</sup> "Question and Answer, USCIS National Stakeholder Meeting" (April 29, 2008), *published on* AILA.org at Doc. No. 08050667.

preference, as he was now the son of a U.S. citizen.<sup>61</sup> The BIA found that the age-determination formula of the CSPA—found at INA §203(h)(1)—was irrelevant once the mother had naturalized.

In the same decision, the BIA also ruled that the son could not opt out of the 1st preference to remain in the family 2A preference category, finding that INA §204(k)(2) restricted this alternative to opting out of the 1st preference to only the family 2B preference category.<sup>62</sup> In that case, the family 2B category would not have benefited the son.

It is very important to counsel clients about the possible adverse impact that a parent's naturalization could have on the application of a beneficiary child.

## 6. DOES THE CSPA APPLY RETROACTIVELY?

The CSPA was effective on August 6, 2002. It applies to all children who turn 21 after this effective date, provided all other requirements of the CSPA are met.<sup>63</sup> The statute has an effective date provision (section 8) which governs how the statute is to be applied to cases in which some relevant event occurred prior to August 6, 2002, the date that the CSPA was adopted, but other events took place after this date. USCIS has interpreted this provision as applying the CSPA to three sets of cases:

- Cases in which the visa petition was approved prior to August 6, 2002, but a final determination has not been made on a beneficiary's application for an immigrant visa or adjustment of status pursuant to the approved petition;
- Cases in which the visa petition is pending on or after August 6, 2002; and
- Cases in which the application for an immigrant visa or adjustment of status is pending on or after August 6, 2002.<sup>64</sup>

USCIS had interpreted the statutory term “final determination” (as used in CSPA §8(1)) to mean agency approval or denial issued by USCIS or EOIR.<sup>65</sup> In contrast, the Ninth Circuit in *Padash v. INS*,<sup>66</sup> rejected the interpretation of a “final determination” as limited to an agency determination, and instead found that there was no final determination of an adjustment application when an appeal of the agency's denial of the application was pending in federal court.

---

<sup>61</sup> *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011).

<sup>62</sup> *Id.*

<sup>63</sup> Both USCIS and DOS agree that the statute applies to a child who ages out after August 6, 2002, the statute's effective date. In determining whether a child aged out before or after this date, it is important to remember the 45-day extension contained in the USA PATRIOT Act. *See* section 3, *supra*.

<sup>64</sup> CSPA §8 (not codified in the INA).

<sup>65</sup> It is not clear whether this remains the agency's interpretation, since the memo in which this interpretation appeared has since been replaced. *See* “Revised Guidance for the CSPA,” *supra*, replacing “[The Child Status Protection Act—Memorandum Number 2](#),” February 14, 2003.

<sup>66</sup> *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004).

In *Padash*, the petitioner was a derivative beneficiary of a family 4th preference visa petition. He was a child at the time that the visa became available, and applied for adjustment of status within one year of that date. He turned 21, however, while his adjustment application was pending before an immigration judge (IJ). In decisions pre-dating the effective date of the CSPA, both the IJ and the BIA denied his adjustment application because he had “aged out.” Padash filed a petition for review, which was pending on the effective date of the CSPA.

The Ninth Circuit first found that Padash satisfied the definition of a child under §3 of the CSPA (8 USC §1153(h)(1)). The court next considered whether the CSPA applied to him. Following basic rules of statutory interpretation, the court determined that because the appeal of his adjustment of status application was pending before the court on the effective date of the statute, no “final determination” had yet been made on the application and the CSPA did apply to him.

The BIA also has resolved an issue relating to the meaning of CSPA § (8)(1). In *Matter of Avila-Perez*,<sup>67</sup> the BIA held that the CSPA applied where a visa petition for an immediate relative was approved prior to August 6, 2002, but no adjustment application was pending on that date. Instead, the adjustment application was filed subsequently. In so holding, the BIA rejected DHS’ argument that, for this effective date provision to be triggered, an adjustment application must have been pending on August 6, 2002.

Over a year later, USCIS issued a new memorandum that, *inter alia*, implements the holding of *Matter of Avila-Perez*.<sup>68</sup> This memo reverses USCIS’s earlier position that had required an application for permanent residence to be pending on August 6, 2002. It also attempts to remedy the situation for those wrongly denied or discouraged from filing under the old policy.

First, it allows a beneficiary of a visa petition approved prior to August 6, 2002 to file a motion to reopen his or her adjustment application where that application had been denied under the prior policy because it was filed after August 6, 2002, provided the beneficiary meets all other requirements for CSPA coverage.

Second, the memorandum also provides for those who did not apply for adjustment of status but who would have been eligible but for the erroneous agency policy. It allows a beneficiary whose visa became available on or after August 7, 2001 (one year prior to the statute’s adoption date), to apply for adjustment now, even though this adjustment application would not be filed within one year of the visa availability date.

On June 15, 2009, USCIS issued guidance on this memorandum in the form of a “Questions and Answers” fact sheet.<sup>69</sup> This fact sheet does not offer any new interpretation but instead attempts to explain the April 30, 2008, memorandum. In 2011, the Seventh Circuit issued a decision confirming an interpretation of the statute as applying to cases in which the adjustment application had been filed prior to 2002 but no final decision had been issued as of the date that the CSPA was adopted.<sup>70</sup>

---

<sup>67</sup> 24 I&N Dec. 78 (BIA 2007).

<sup>68</sup> See “Revised Guidance for the CSPA,” *supra*.

<sup>69</sup> “Questions and Answers, USCIS Guidance on the Applicability of the Child Status Protection Act (CSPA)” (June 15, 2009), *published on AILA.org* at Doc. No. 09061634.

<sup>70</sup> *Arobodelize v. Holder*, 655 F.3d 513 (7th Cir. 2001).

